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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

NO. 423

ERNEST NIGHTINGALE, et al, Petitioners

v.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

NO. ....

ERNEST NIGHTINGALE, Petitioner

v.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Western District of Pennsylvania which had sentenced petitioner for three separate conspiracies (distinct in time and place) to forge and utter stolen United States securities and for eighteen separate counts for substantive offenses involving the forging and uttering of certain stolen securities.

## OPINIONS BELOW

The Court of Appeals affirmed the judgment of the District Court its opinion is not yet reported but is included as Appendix C. The opinion of the District Court is not reported. It is reproduced in Appendix "A" to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22(2).

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## QUESTIONS PRESENTED

1. Should not this Court take jurisdiction when the decision of the Court of Appeals for the Third Circuit in an important matter of defendants' right in criminal cases is in direct conflict with the decisions of the Court of Appeals for the District of Columbia Circuit, and the Seventh, Fourth, Ninth and First Circuits?

2. Should not this Court take jurisdiction when the Court of Appeals for the Third Circuit has decided that petitioner can be compelled to stand trial on three separate, distinct and unconnected conspiracies and the separate, distinct and unconnected substantive counts, the object of each conspiracy, when such decision is in direct conflict with this court's decision in *McElroy v. U. S.*, 164 U.S. 76, 17 S.Ct. Rep. 31?

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## CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

1. General Conspiracy Statute, 18 U.S.C. 371:

"If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

*Procedural Rules Involved.*

2. The Certificate Forgery Statute, 18 U.S.C. 495:

"Whoever falsely makes, alters, forges, or counterfeits any * * * certificate * * * for the purpose of obtaining or receiving * * * from the United States * * * any sum of money; whoever utters * * * any such * * * forged writing, with intent to defraud the United States, shall be fined not more than $1,000.00 or imprisoned not more than ten years, or both."

3. Rule 8(b) Rules of Criminal Procedure:

"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

4. Rule 14 Rules of Criminal Procedure:

"Relief from Prejudicial Joinder

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

## STATEMENT OF THE CASE

The 23rd Count of the Indictment charged the petitioner Nightingale, Horovitz, Stringi and Simon, with a conspiracy to violate Section 495 of Title 18 U.S.C., by forging the endorsement of the registered owner Hammond on 28 stolen United States Savings Bonds and by uttering same. This count charged that the conspiracy began on February 26, 1963, and the offense occurred at Berlin, Somerset County, and Pittsburgh, Allegheny County, Pennsylvania.

The 1st Count in the Indictment charged petitioner Nightingale, Stringi and Horovitz with the forging of a particular one of said 28 bonds on February 26, 1963. The 2nd Count charged the petitioner Nightingale, Stringi and Horovitz with the uttering of said bond on February 26, 1963. The 3rd, 4th, 5th and 6th Counts charged petitioner Nightingale, Stringi and Horovitz with the forging and uttering of two other stolen bonds.

The 24th Count was a conspiracy count charging the petitioner Nightingale, Cochran, Stringi and Simon with conspiracy to violate Section 495 of Title 18 U.S.C. This conspiracy was laid on March 28, 1963, and was alleged to have occurred at Berlin, Somerset County, and Pittsburgh, Allegheny County, Pennsylvania. It was alleged that the conspirators agreed to forge the endorsement of the registered owner Stofcheck to 81 United States Savings Bonds and to utter same.

The 7th Count charged that the petitioner Nightingale, Stringi and Cochran on the 28th of March, 1963, at Berlin, Somerset County, Pennsylvania, forged one of the 81 stolen bonds.

The 8th Count charged the petitioner Nightingale, Stringi and Cochran with uttering said stolen bond.

The 9th, 10th, 11th and 12th Counts charged the said Nightingale, Stringi and Cochran with the uttering and forging of two other specific bonds of the said 81 stolen bonds.

The 25th Count charged the petitioner Nightingale and Stringi with a conspiracy to violate Section 495 of Title 18 in that on May 10, 1963, at Somerset, Somerset County, and Pittsburgh, Allegheny County, Pennsylvania, said conspirators forged the endorsement of Stellitano, the registered owner of 348 United States Savings Bonds, and uttered same.

The 13th Count charged the petitioner Nightingale and Stringi with the forging of one of the said Stellitano bonds on May 10, 1963, at Somerset, Somerset County, Pennsylvania.

The 14th Count charged the uttering of said Stellitano bond on May 10, 1963.

The 15th, 16th, 17th and 18th Counts charged the petitioner Nightingale and Stringi with the forging and uttering of two other of the stolen Stellitano bonds.

The Government did not contend that the defendants stole the bonds.

The petitioner Nightingale, both before and during the trial, moved the Court, pursuant to the Criminal Rules, for a severance, and also moved the Court to require the United States Attorney to elect which of the conspiracies, with the attendant substantive counts it would try. These motions were denied by the trial judge and the trial resulted in a verdict of guilty on all counts.

## REASONS FOR GRANTING THE WRIT

It is clear that the petitioner's liberty is at stake as are the liberties of many multiple defendants who are obliged to stand trial with other defendants and meet charges of other unrelated and distinct crimes. It was unfair to petitioner to require him to defend in one trial the three conspiracies and the eighteen separate charges of forging and uttering. The counts were distinct and several offenses, not parts of the same transaction but independent, and not provable by the same evidence. It is of great importance in the administration of criminal justice generally that the procedure be settled so that there be uniformity in the District Courts for the trial of multiple defendants on multiple count indictments. It is particularly important that the law be settled as to whether or not three separate conspiracies involving separate acts and transactions and in no way connected, involving different defendants, can be tried at one and the same trial.

The decision of the Court of Appeals for the Third Circuit in petitioner's case is in direct conflict with the following Court of Appeals decisions of other circuits:

*U. S. v. Spector,* (7th Cir.), 326 F.2d 345;

*Ingram v. U. S.,* (4th Cir.), 272 F.2d 567;

*Metheany v. U. S.,* (9th Cir.), 365 F.2d 90;

*Ward v. U. S.,* (District of Columbia Cir.), 289 F.2d 877;

*King v. U. S.,* (1st Cir.), 355 F.2d 700;

*Cross v. U. S.,* (District of Columbia Cir.), 335 F.2d 989.

Therefore it is of great importance that this Court declare the uniform law with respect to the Federal Law relating to single trials of multiple defendants charged with multiple counts.

The decision of the Third Circuit Court of Appeals is directly in conflict with the decision of this Court decided many years ago where the Supreme Court of the United States decided this question squarely opposite to that reached by the Third Circuit Court in the case of *McElroy et al. v. U. S.*, 164 U.S. 76, 17 S. Ct. Rep. 31. McElroy is indistinguishable from the present case.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

VINCENT M. CASEY
Attorney for Petitioner

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## CERTIFICATE OF SERVICE

I certify that I served five (5) copies of the foregoing Petition upon the Solicitor General of the United States, Department of Justice, Washington 25, D.C., by placing them in the United States Mail addressed to him.

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Attorney for Petitioner

## APPENDIX "A"

### Opinion.

(Filed April 5, 1966.)

ROSENBERG, *District Judge*

The defendants, Frank Stringi, Ernest Nightingale and Charlann M. Simon, have filed motions for Judgment of Acquittal, New Trial and Arrest of Judgment following their convictions by a Federal jury. Their contentions were previously considered and rejected before and during their trial. After reconsideration of their contentions, it is my opinion that the defendants' motion should be denied.

The evidence presented by the Government can be briefly summarized. On February 26, 1963, defendant Frank Stringi, accompanied by defendants Joseph Horowitz and Charlann M. Simon, proceeded from Pittsburgh, Pennsylvania, to Berlin, Pennsylvania, where they met with the defendant, Ernest Nightingale, a director of the First National Bank of Berlin. After discussion, it was arranged that Horovitz would pose as Walter Hammond, the registered co-owner of a quantity of the United States Savings Bonds which had previously been stolen from another co-owner. The four defendants entered the First National Bank of Berlin where Nightingale, in the presence and within the hearing of Stringi and Simon, introduced Horovitz to bank officials as Walter Hammond. Each defendant knew the true identity of Horovitz. After the false identification of Horovitz, Horovitz proceeded to forge the endorsement of Walter Hammond to twenty-eight (28) $1,000

United States Savings Bonds. The bonds were negotiated and the proceeds distributed.

On March 18, 1963, Elvin E. Cochran, whose true identity was well known by the defendants Stringi and Simon, was driven to Berlin, Pennsylvania, by Simon at Stringi's direction. In route Simon delivered to Cochran eighty-one (81) United States Savings Bonds registered in the name of Albert Earl Stofcheck. These bonds, like the Hammond bonds, had been stolen from the true owner. Simon had received these bonds from Stringi. Upon the arrival of Cochran and Simon they were met by Nightingale, who accompanied them to the First National Bank of Berlin. Nightingale introduced Cochran to the bank officials as Albert E. Stofcheck, well knowing his true name to be Elvin (Red) Cochrane. Cochran then forged the name of Mr. Stofcheck to eighty-one (81) United States Savings Bonds and negotiated these bonds for the sum of $9,409.37. A portion of this money was received in cash by the defendant Nightingale, part was placed in a joint account opened in the names of Nightingale and Stringi, and $5,409.37 was received in the form of a Cashier's check, payable to Ernest Nightingale. This check was endorsed by Nightingale, and given to Miss Simon who subsequently delivered it to Stringi.

On May 9, 1963, the defendant Stringi instructed Joseph Vento, an employee, to go to Somerset, Pennsylvania, to meet Ernest Nightingale. Nightingale, who in the past had met Joseph Vento and knew him by his true name, introduced Vento at the Cambria Savings and Loan Association, Somerset, Pennsylvania, as Annunzio Stellitano. Vento signed Stellitano's name to three hundred forty-seven (347) United States Savings

Bonds having a redemption value of $8,186.01. The Stellitano bonds had previously been stolen from the true owner. After the signing of the bonds, they were negotiated and the proceeds distributed.

In Counts 1 through 7 of the indictment, the defendants Stringi, Nightingale and Horovitz were charged with the substantive offenses of forging and uttering the Hammond bonds, in violation of 18 U.S.C. § 495.[1] In Count 23, the defendants Stringi, Nightingale, Horovitz and Simon were charged with conspiracy to forge and utter the Hammond bonds, in violation of 18 U.S.C. § 371.[2] Prior to trial, the defendant Horovitz pleaded

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1. "Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

2. "If two or more persons, conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

guilty to some of these counts and appeared as a Government witness against his co-defendants.

In Counts 8 through 12, the defendants Stringi, Nightingale and Cochran were charged with the substantive offenses of forging and uttering the Stofcheck bonds, in violation of 18 U.S.C. § 495. In Count 24, the defendants Stringi, Nightingale, Simon and Cochran were charged with conspiracy to forge and utter the Stofcheck bonds, in violation of 18 U.S.C. § 371. Prior to trial, Cochran changed his plea to guilty as to some of these counts and testified as a Government witness against his co-defendants.

In Counts 13 through 18, the defendants Stringi and Nightingale were charged with the substantive offenses of forging and uttering the Stellitano bonds, in violation of 18 U.S.C. § 495. In Count 25 the defendants Stringi and Nightingale were charged with conspiring to forge and utter the Stellitano bonds, in violation of 18 U.S.C. § 371. In Counts 19 through 22, the defendants Stringi and Nightingale were charged with false personation in connection with negotiation of certain bearer bonds. I dismissed these charges during the trial.

On December 14, 1964, the jury returned verdicts of guilty as to defendants Stringi, Nightingale and Simon as to each count in which the defendants were charged with the exception of Counts 19 through 22 which had already been dismissed.

The major point raised by the defendant is that the Court erred in refusing to sever the counts against the defendants and require separate trials as to each of the

involved transactions. Their contention is based on the premise that the Hammond, Stofcheck and Stellitano transactions were different and unrelated. However, in my opinion, these transactions fell within the provisions of Rule 8 of the Federal Rules of Criminal Procedure which permits joinder where the multiple offenses "are of the same or similar character" or "are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan"; nor need all of the defendants "be charged in each count." Matthews v. United States (C.A. D.C., 1963), 319 F. 2d 740; Williamson v. United States (C.A. 9, 1962), 310 F. 2d 192; Pummill v. United States (C.A. 8, 1961), 297 F. 2d 34. The defendants attempt to make much of the fact that I granted separate trials to defendants Horovitz and Cochran. This relief was under Rule 14 of the Federal Rules of Criminal Procedure which provides for judicial discretion to order a severance of counts or defendants in the interests of justice. Counsel for the United States and for the defendants Horovitz and Cochran brought to my attention at the time of presenting motions for severance that these cases would most likely be disposed of by pleas of guilty. This is actually what happened: subsequent to the severance, both these defendants pleaded guilty and testified at the trial of their co-defendants. However, as to Stringi, Nightingale and Simon, no compelling reason appeared to command a similar exercise of discretion. In my opinion, none of the defendants were unfairly prejudiced before the jury by a joint trial.

The defendants Stringi and Simon contend that the indictment is defective because the term "other writ-

ings" in Title 18 U.S.C. § 495 does not include United States Government Savings bonds. They contend that the indictment should have been under 18 U.S.C. § 471,[3] a statute which refers specifically to government obligations. However, the instant case involves forged endorsements on the back of the bonds. Under the appropriate law, it appears that forged endorsements constitute "other writings" under § 495 but may not be the basis of prosecution under § 471. Cf. Prussian v. United States, 282 U.S. 675 (1931); United States v. Henderson, 298 F. 2d 522, 526, C.A. 7, 1962, cert. den. 369 U.S. 878.[4]

The defendant Charlann Simon, contends that the evidence as to her was insufficient. While the evidence may not demonstrate that she was a major violator in this scheme, there is sufficient evidence to permit a finding that she was engaged in criminal conspiracies. United States v. Mullins, 325 F. 2d 145, C.A. 2, 1963;

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3. "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

4. While it does not differentiate between § 495 and § 471, a similar case involving stolen bonds supported conviction on § 495. United States v. Campisi, 306 F. 2d 308, C.A. 2, 1962, cert. den. 371 U.S. 920, 925, 959, 83 S. Ct. 287, 293, 500, 9 L. Ed. 2d 229, 233, 507, rehearing den. 371 U.S. 959, 83 S. Ct. 502, 9 L. Ed. 2d 507. Prosecutions involving government checks are also based on § 495. Walker v. United States, 342 F. 2d 22, C.A. 5, 1965; Leonard v. United States, 324 F. 2d 911, C.A. 9, 1963; Kitchens v. United States, 272 F. 2d 757, C.A. 10, 1959, cert. den. 362 U.S. 946, 80 S. Ct. 809, 4 L. Ed. 2d 772; Hoffman v. United States, 244 F. 2d 378, C.A. 9, 1957.

United States v. Carlucci, 288 F. 2d 691, C.A. 3, 1961, cert. den. 366 U.S. 961; United States v. Migliorino, 238 F.2d 7, C.A. 3, 1956.

In Migliorino, Judge Staley said:

"Inasmuch as this case contains direct evidence that Migliorino was present while the criminal scheme was being formed, it goes far beyond the minimum evidentiary requirements in conspiracy cases."

The evidence amply supports the jury's verdict as regards Charlann Simon.

At the trial, the defendant Nightingale offered witnesses as to his good reputation in the community. Some of these witnesses were cross examined as to their knowledge of an incident wherein this defendant allegedly altered the writings on a check in order to obtain additional payments on a contract. These questions were asked to test the knowledge of the witness as to the good name of the defendant. Out of the hearing of the jury, the government established that the incident was known in the community and the question had a sound factual basis (Tr. pgs. 1127-1129). I instructed the jury regarding the limited purpose for which this question was permitted at the time of the questioning (Tr. pgs. 1134-1136) and also at the conclusion of the trial (Tr. pgs. 1978-1979). This procedure complies with the requirements set forth in Michelson v. United States, 335 U.S. 469 (1948).

In his brief and at oral argument, the defendant Stringi contended that the court erred in not inspecting the grand jury minutes for possible inconsistency in the testimony of a government witness, Elvin Cochran.

However, the record reveals that I did inspect the grand jury transcript without finding inconsistencies and denied the defendant's motion (Tr. pg. 1131). The procedure followed by me appears fully consistent with Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) and United States v Boyance, 329 F. 2d 372, C.A. 3, 1964, cert. denied, sub nom. Feldman v. United States, 377 U.S. 965 (1964).

I have also considered the various other contentions raised by the defendants. These were denied in previous rulings and, in my opinion, are without merit.

The defendant's motions will be denied.

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ORDER

AND NOW, TO-WIT, this 15th day of March 1966, for the reasons set forth in the foregoing Opinion, the defendants' motions for Judgment of Acquittal, New Trial and Arrest of Judgment are hereby denied.

LOUIS ROSENBERG,
*United States District Judge.*

cc: Counsel of Record

## APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,975

UNITED STATES OF AMERICA
v.
FRANK STRINGI, ERNEST NIGHTINGALE, JOSEPH HOROVITZ, SHARLANN S. SIMON, also known as CHARLANN MARIE SIMON, ELVIN E. COCHRAN, ERNEST NIGHTINGALE, Appellant

(D. C. Criminal No. 64-299)

On Appeal From the United States District Court for the Western District of Pennsylvania

Present:

KALODNER, HASTIE and VAN DUSEN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 13, 1966, be, and the same is hereby affirmed.

ATTEST:
M. ELIZABETH FERGUSON
Chief Deputy Clerk

June 30, 1967

## APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15974
No. 15975

UNITED STATES OF AMERICA
v.
FRANK STRINGI, ERNEST NIGHTINGALE, JOSEPH HOROVITZ, SHARLANN S. SIMON, ALSO KNOWN AS CHARLANN MARIE SIMON AND ELVIN E. COCHRAN.

FRANK STRINGI,
*Appellant in No. 15974,*

ERNEST NIGHTINGALE,
*Appellant in No. 15975.*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 19, 1967

Before: KALODNER and HASTIE, *Circuit Judges*; and VAN DUSEN, *District Judge.*

### OPINION OF THE COURT
(Filed June 30, 1967)

PER CURIAM:

The appellants have been tried and convicted on several substantive and conspiracy counts growing out of events which occurred during the winter and spring of 1963 in a small county of Pennsylvania. Each count involved some aspect or aspects of a series of transactions in which purported endorsements of owners of

United States Series E Savings Bonds were forged and, thereafter, the bonds were negotiated.

Over the appellants' objections all counts were tried together. In our view the offenses and the transactions charged were so related that the court's insistence that they be tried together did not constitute an abuse of discretion.

The appellants also complain that the court permitted the cross-examination of character witnesses as to whether they had heard that the defendant Nightingale, as to whose reputation for honesty they had testified, had asserted in an earlier civil case that certain writings were on a check at the time it was drawn when in fact, as subsequently proved, he himself had added the writing after the check had been cashed. The court below was satisfied by a government tender of proof, made in the absence of the jury, that the government could prove the occurrence of the derogatory transaction thus inquired about to impeach the testimony of good reputation. Moreover, two of the character witnesses admitted that they had or may have heard the derogatory information about the defendant. In these circumstances, we find no error in the inquiry made about any awareness to this matter in the cross-examination of the defense character witnesses.

The conviction and sentence of each defendant were proper and will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*